

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ANDREW GENETT	:	
	:	
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods March 1, 1994 through February 29, 1996,	:	
June 1, 1998 through August 31, 1998, and December 1,	:	
1998 through February 28, 1999.	:	
	:	
	:	DETERMINATION
	:	DTA NOS. 819083
	:	AND 819084
In the Matter of the Petition	:	
	:	
of	:	
	:	
ANDREW GENETT	:	
	:	
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Year 1999.	:	
	:	

Petitioner, Andrew Genett, 220 Rodney Street, Glen Rock, New Jersey 07459, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1994 through February 29, 1996, June 1, 1998 through August 31, 1998, and December 1, 1998 through February 28, 1999 and a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1999.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on April 25, 2003 at 10:30 A.M., with all briefs to be submitted by June 11, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Nathan B. Sloan, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Cynthia E. McDonough, Esq., of counsel).

ISSUE

I. Whether petitioner, as an employee of a limited partnership, who as its controller provided accounting services related to its operation of a Manhattan restaurant business, was a person required to collect tax under Tax Law § 1131(1) so that he is personally liable for sales tax determined due for the periods March 1, 1994 through February 29, 1996, June 1, 1998 through August 31, 1998, and December 1, 1998 through February 28, 1999.

II. Whether petitioner, as an employee of a limited partnership acting as its controller while it was under a receivership pending bankruptcy, was a person required to collect, account for and pay over income taxes withheld by the limited partnership from the wages of its few remaining employees during the phasing out of its existence, and, if so, whether he willfully failed to do so.

FINDINGS OF FACT

1. The Division of Taxation ("Division"), by its Tax Compliance Division-Bankruptcy, issued three notices of determination, each dated July 9, 2001, against petitioner, Andrew Genett,

as an officer or responsible person of the limited partnership, Fashion World Company, LP¹

(“Fashion World”), asserting tax, penalty and interest as follows:

Assessment ID	Sales Tax Period	Tax Asserted Due	Interest	Penalty	Payments/ Credits	Total Asserted Due
L-019809389	3/1/94-2/29/96	\$ 226,070.68	\$238,657.20	\$ 83,355.75	\$ 12,387.47	\$ 535,726.16
L-019809390	6/1/98-8/31/98	46,216.43	18,796.55	14,104.95	0.00	79,117.93
L-019809388	12/1/98-2/28/99	39,209.29	1,179.01	6,295.99	39,209.29	7,475.00

Approximately two and one-half years earlier, the Division by its Metropolitan District Office had issued a Statement of Proposed Audit Change for Sales and Use Tax dated December 21, 1998 against Fashion World, for which the Division claims petitioner was a “responsible person.” This statement provided the following breakdown of the \$226,070.68 in sales tax asserted due on audited gross sales of \$8,401,913.00 for the sales tax period March 1, 1994 through February 29, 1996:

Period Ended Date	Sales and Use Tax Asserted Due
05/31/94	\$ 119.31
08/31/94	151.82
11/30/94	2,525.84
02/28/95	18,011.97
05/31/95	133,977.41
08/31/95	24,581.94
11/30/95	25,225.30
02/29/96	21,477.09
Total	\$226,070.68

¹ On the sales tax return included in the record, the legal name for the sales tax vendor shown on the return is Fashion World Co. LP/ Fashion Cafe.

2. The Division by its Tax Compliance Division-Bankruptcy, also issued four notices of deficiency against petitioner, as an officer or responsible person of Fashion World, each dated July 9, 2001, asserting penalty due under Tax Law § 685(g) of \$2,217.91, \$6,271.95, \$3,673.06, and \$2,442.48 for the withholding tax quarters ending March 31, 1999, June 30, 1999, September 30, 1999 and December 31, 1999, respectively.

3. Fashion World did business as Fashion Café New York and operated a Manhattan restaurant and bar located in Rockefeller Plaza. It was the result of a creative plan of two brothers, Tommaso Buti and Francesco Buti, to develop a theme restaurant, like Planet Hollywood, with the potential for future franchising of the concept. Fashion World would build upon the glamor of supermodels and high fashion. The Manhattan restaurant and bar consisted of 8,000 square feet with a runway down the middle of the premises for the models and fashion shows, with a seating capacity of 220 people.

4. Tommaso Buti and Francesco Buti were the managing partners of the limited partnership, Fashion World, incorrectly designated in the field audit report as a corporation.² On its application for registration as a sales tax vendor dated March 23, 1995 and signed by Tommaso Buti, Fashion World listed Tommaso Buti as its president and Francesco Buti as its vice president.

5. Fashion World was one entity in a collection of entities, including a holding company known as Fashion Café, Inc. and other limited partnerships and corporations³ created to carry out the plan of the Buti brothers, to operate and franchise restaurants and license products associated

² The audit report describes Tommaso Buti as the president and chief executive officer of Fashion World and his brother Francesco Buti as its chief financial officer and secretary.

³ A schedule included in a court order dated August 28, 1998, discussed further in Finding of Fact “5”, listed the following “Fashion World Affiliates”: Fashion World Company LP, Buti Management, Fashion Café Inc., Fashion Café Europe, Fashion Café International, Fashion Café, LLC (N.O.), Fashion Café (UK), Fashion Travel, Pan European Professional Services and Licensing Company, LTD., FT Ventures, Columbia Foods, Eat Healthy, Fashion Production, FAU Restaurant Corp, Food Evolution, Buti Inc.

with the fashion world, supermodels, and related celebrities. The brothers attracted numerous investors and participants, including high profile supermodels, Claudia Schiffer, Elle Macpherson and Naomi Campbell, as well as European investors. The initial investment in the overall enterprise was approximately \$5,000,000.00. The Buti brothers' ultimate goal was to create a valuable trademark, Fashion Café, and to develop Fashion Cafés in 37 separate cities. Before their grand plan collapsed in bankruptcy, there were two restaurants like Fashion Café New York up and running, apparently by sister entities: Fashion Café UK in London and Fashion Café New Orleans in the southern American city. By the end of January 1999, all three restaurants had stopped operations. On May 21, 1999, bankruptcy proceedings were commenced for each of the entities organized by the Buti brothers, including Fashion World, in their attempt to develop their Fashion Café business concept.

6. These bankruptcy filings had been preceded by contentious litigation in both Federal and state courts between the Buti brothers and Luigi Palma, a disgruntled limited partner who had invested in Fashion World to obtain an approximately 4% interest in the partnership. Mr. Palma claimed that the brothers had wasted the partnership's assets by misappropriation of funds, and he asserted that they enriched themselves at the expense of the partnership by diverting assets and income from the partnership to other entities controlled by them. He contended that the brothers used business resources to pay for an expensive Manhattan apartment, a collection of cars, a private jet and an extravagant lifestyle. The state court lawsuit by Mr. Palma in New York eventually resulted in the limited partners taking over management of Fashion World from the brothers; a court order dated August 28, 1998 appointed Henry Lehmann as a monitor, with the assistance of Carla Roher, who "will approve all checks or wire transfers prior to issuance and review disbursements and journal entries daily." The court order also directed the Buti brothers to "fund the costs necessary to ensure the continued operations of

the Fashion Café Restaurant at Rockefeller Center, but only to the extent that the receipts of the Restaurant are insufficient to meet such needs.” Petitioner as controller of the partnership under the direction of the Buti brothers was initially relieved of his duties on behalf of the partnership apparently on the basis of some suspicion that he was involved in their financial scheming. As noted in Finding of Fact “2”, the Division has asserted sales and use taxes due for the quarter ended August 31, 1998. The sales tax return for such period which shows taxable sales of \$842,187.00 and tax due of \$46,216.43 was filed on or about September 20, 1998 with no remittance.⁴ Petitioner did not sign this return since he was initially excluded from involvement in the operation of Fashion World with the appointment of the monitor and his assistant as noted above. Subsequently, it was determined that Mr. Genett was not guilty of any malfeasance after an investigation by the court-appointed monitor, and he was brought back into the company in October of 1998 to serve as its controller during the windup of its affairs. The plan was to keep the restaurant in operation until after the Christmas holidays. As noted in Finding of Fact “1”, sales and use taxes for the sales tax quarter ended February 28, 1999 have been paid with the Division asserting liability only for interest and penalty against petitioner.

7. As noted in Finding of Fact “1”, the Division has asserted that Fashion World was liable for a substantial unpaid sales tax liability of \$226,070.68 for the period March 1, 1994 through February 29, 1996. The limited partnership’s controller during this period was Ralph Lucarello, who was fired by Fashion World, and eventually replaced by Mr. Genett. Prior to commencing his employment with Fashion World on July 23, 1996, Mr. Genett, who holds a college degree in accounting, was employed by manufacturing companies in the apparel industry. In these prior positions, he earned approximately \$80,000.00 per year. When he

⁴ In his brief, petitioner asserts “The sales tax owing for this period was subsequently paid” although there is nothing in the record to substantiate this assertion.

commenced his employment with Fashion World, his salary was a similar amount, but the new position offered petitioner the excitement of working in what he thought would be a more attractive enterprise with growth potential. After employment by Fashion World for approximately a year and one-half, his salary increased to \$100,000.00 where it remained for his tenure with the business. Petitioner never had any ownership interest in Fashion World and always remained a salaried employee with no ownership interest in the business. In all, petitioner was employed by Fashion World for approximately three and one-half years.

8. During Mr. Genett's tenure as controller of Fashion World, all sales and use taxes were paid although sometimes payment was late. Sales and use taxes were not paid for the initial period when the court appointed a monitor and an assistant to be responsible for such matters as noted in Finding of Fact "6", and petitioner was not present on the premises. No payroll taxes were remitted by Fashion World during 1999 when the enterprise was being operated under the direction of a court-appointed monitor and after May of 1999 by a trustee in bankruptcy. The payroll for the business as it wound down consisted of only four to six people performing office functions. Mr. Genett was not instructed by either the court-appointed monitor or trustee in bankruptcy to remit payroll taxes.

9. Mr. Genett, as controller, had the authority to sign checks for Fashion World and did so, including checks in payment of taxes which on occasion proved to be bad checks due to insufficient funds. Nonetheless, the Buti brothers, as the owners of Fashion World, had ultimate authority to determine which bills were paid since they controlled the deposit of monies to the business checking account to cover checks in payment of Fashion World's liabilities. Petitioner also signed various documents on behalf of the business, including sales tax returns, withholding tax returns, a test period audit method election form, and for the month of September 1999 a monthly operating report to the bankruptcy court signed on December 10, 1999 which showed

operating profit of \$13,826.14 with monthly disbursements of \$63,673.86. The only other similar report in the record is for the month of June 1999 and signed by petitioner as controller on August 4, 1999 which shows zero disbursements and profit. Petitioner as controller signed two consents extending the period of limitation for assessment of sales and use taxes on behalf of the partnership on the line for the "Signature of owner, partner or corporate officer," one dated June 8, 1998 and the other dated November 3, 1998.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner contends that sales tax was always paid during his tenure, and the substantial liability for unpaid sales tax was for a period prior to his employment. He concedes that sometimes sales tax was paid late as a result of insufficient funds in the partnership's checking account which was the responsibility of the managing partners, the Buti brothers. As controller of the partnership, petitioner argues he was merely fulfilling the wishes of the managing partners in doing the partnership's accounting. He claims he had no authority to determine who got paid and he "had the authority to sign checks at various times during his employment as an accommodation to and for the convenience of the controlling parties" (Petitioner's brief, p. 2). Petitioner emphasizes that he was merely a salaried employee, never having an ownership interest in the business. Withholding taxes which were not remitted, he contends were for the period when the partnership was under the control and monitoring of a court-appointed receiver and then a bankruptcy court receiver, and he was not instructed to remit payroll taxes.

11. The Division concedes that petitioner is not liable for the largest amount at issue in this proceeding, sales tax due of \$226,070.68 for the two-year period March 1, 1994 through February 29, 1996, as a result of the expiration of the period of limitations to assess petitioner. Nonetheless, it contends petitioner is liable as a responsible person for any unpaid sales and use

taxes plus penalties and interest and unpaid payroll taxes based upon his employment as controller by the partnership. It points to the following factors: (i) petitioner's substantial salary from the partnership, (ii) his signing of checks, tax returns, and legal documents, and (iii) no evidence presented that petitioner took any steps to correct the situation of taxes not being paid by the partnership when he had knowledge of this situation.

12. In his reply brief, petitioner counters that the Division fails to appreciate the distinction between "the authority to sign checks and the authority to determine to whom the checks are to be issued" (petitioner's reply brief, p. 1). He also complains that the Division ignores consideration of the important factor of whether he had "the power to hire and fire employees" (petitioner's reply brief, p. 1). According to petitioner, the Division has ignored the important fact that he was not in the employment of the partnership at various times when taxes were not paid and should therefore not be liable as a responsible person of the partnership for such taxes.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1132(a)(1), sales tax "shall be paid to the *person required to collect it*, as trustee for and on account of the state (emphasis added)."

B. Tax Law § 1131(1) defines "persons required to collect [sales] tax" as follows:

[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any *employee of a partnership* or any employee of an individual proprietorship who as such officer, director or *employee is under a duty to act for such* corporation, *partnership* or individual proprietorship in complying with any requirement of this article; and any member of a partnership (emphasis added).

This definition encompasses much more than the vendor, in this case, the limited partnership, Fashion World and "any member" of the partnership, notably the general partners, Tomasso Buti and Francesco Buti. As emphasized, any employee of a partnership, who as such

employee is under a duty to act for the partnership, is also a person required to collect sales tax *in trust* for the State. Furthermore, Tax Law § 1133(a) makes “every person required to collect any tax” *personally liable* for sales tax required to be so collected.

C. Both petitioner and the Division agree that the determination of whether an individual is a person under a duty to act for a business operation is based upon a close examination of the particular facts of the case. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation (*Matter of Constantino, supra*).

Here, where the sales tax vendor was a partnership, the factors are the same merely requiring a fine-tuning of terminology since the circumstances under review involve a partnership and not a corporation.

D. The Division also correctly adds that petitioner bears the burden of proving that the close examination of the particular facts of this matter supports his position that he was not a person under a duty to act for Fashion World (*see, Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, *annulled in part* 204 AD2d 916, 612 NYS2d 503, *modified* 86 NY2d 165, 630 NYS2d 680, *cert denied* 516 US 989, 133 L Ed 2d 426 [wherein the Tribunal noted that the Division of Taxation does not have the burden of proving the propriety of its assessment, but rather the failure of the petitioner in *Orvis* to “establish the specific facts” required the Tribunal

to “conclude that petitioner has not sustained its burden” in its confirmation of the administrative law judge’s determination (*Matter of Orvis*, Administrative Law Judge Unit, October 17, 1991) which noted that “There is nothing unusual about proving a negative (*see, e.g. Matter of Roncolato*, Tax Appeals Tribunal, August 15, 1991 [where the taxpayer was required to shoulder a burden of proving that he was not a person required to collect sales tax on behalf of a corporation]”).

E. The very factual nature of the analysis required in this matter is reflected by the Tribunal’s decision in *Matter of Moschetto*, (*supra*), which reversed the determination of the Administrative Law Judge (“ALJ”), who had denied the taxpayer’s petition. In deciding against the taxpayer, the ALJ relied on the following facts: (i) the officer received substantial income from the business, (ii) he influenced the hiring of employees and supervised employees, (iii) he had check-signing authority and signed checks; (iv) he had signed one sales tax check; and (v) was a shareholder, a member of the board of directors and had signed an unlimited guarantee with a bank on behalf of the corporation. The Tribunal decided that the above facts relied on by the Administrative Law Judge were:

not sufficient, given the entire circumstances of petitioner’s involvement in City Chrysler, to sustain the conclusion that petitioner had a duty to act for the corporation in complying with the requirements of the sales tax law (*Matter of Moschetto*, *supra*).

The Tribunal noted: (1) the officer received the same salary after he became a shareholder as he had when he was only a manager of service and parts and the amount of income received (\$600.00 a week in 1987 through 1989) did not suggest that he was a responsible officer (when sales tax asserted due was approximately \$400,000.00); (ii) the officer did not hire and fire without the approval of a Sheldon Reynolds, who had the real authority in the business; (iii) his check-signing authority and check-signing activities were circumscribed; and (iv) the officer in

fact had little actual authority over the corporation's affairs, in spite of his titles and investment. In summary, the Tribunal emphasized its similar decision in *Matter of Constantino (supra)*, where it stated:

[P]etitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation.

F. As noted in Finding of Fact "1", \$226,070.68 or 73% of the total sales and use tax at issue in this proceeding of \$311,496.40, was asserted due for the period March 1, 1994 to February 29, 1996. The Division, as noted in Paragraph "11", has conceded that petitioner may not be held liable for taxes asserted due for this earlier period "as a result of the running of the period of limitations to assess petitioner." However, the more important reason why petitioner may not be held so liable is the fact that, as noted in Finding of Fact "7", he did not commence his employment with Fashion World until July 23, 1996, five months after the period at issue had ended. It would be completely irrational to assert that petitioner was under a duty to act for Fashion World for a period that preceded his actual employment as controller of the business. Similarly, petitioner has established, as noted in Finding of Fact "6", with regard to the period June 1, 1998 through August 31, 1998, that he had been relieved of his duties on behalf of the partnership at the time taxes became due for such period. Subsequently, after it had been determined that petitioner was not guilty of any malfeasance, he was brought back into the company in October of 1998. Consequently, it may not be concluded that Mr. Genett was under a duty to act for Fashion World during the time he had been relieved of his duties.

G. Turning to the remaining sales tax period at issue, December 1, 1998 through February 28, 1999, as noted in Finding of Fact "1", the sales tax for such period of \$39,209.29 has in fact been *paid*. Nonetheless, a person who is determined to be under a duty to act for a partnership pursuant to Tax Law § 1131(1) may also be held liable for penalties and interest

properly imposed for failure to timely file returns or pay tax (*Matter of O'Donnell*, Tax Appeals Tribunal, November 3, 1994). The Division places emphasis on petitioner's signing of checks for the partnership and various documents in his capacity of controller and his substantial salary of approximately \$100,000.00 in support of its contention that he was under a duty to act for the partnership in collecting and timely paying over sales tax. However, weighed against these factors is the pivotal factor that petitioner lacked any ownership interest in the partnership, which at the time was in the process of winding down its operation and that petitioner's involvement in the business had been responsible in that he had ensured the payment of taxes for a company whose owners had been guilty of malfeasance⁵ and ultimately should be viewed as responsible for its collapse. Consequently, balancing these factors it is concluded that petitioner should not be held liable for penalties and interest imposed for the partnership's failure to timely file returns or pay tax, especially given the fact the underlying taxes were paid when the business was failing and in the process of shutting down operations.

H. As noted in Finding of Fact "2", the Division also asserts penalty under Tax Law § 685(g) equal to the total amount of income tax "evaded, or not collected, or not accounted for and paid over" of \$14,605.40 for the year 1999. Tax Law § 685(n) defines a "person" required to collect, truthfully account for and pay over withholding taxes in the same fashion as defined in Tax Law § 1131(1), as noted in Conclusion of Law "C", for a person required to collect sales tax. Consequently, based on the analysis above concerning petitioner's status as a person required to collect sales tax on behalf of Fashion World for the period when the business was winding down its affairs, it is concluded that he was not a person required to collect, truthfully

⁵ Petitioner argued he lacked the power to hire and fire, but the record has no evidence concerning this power, one way or the other. Petitioner also did not prove the specific date when a trustee in bankruptcy was appointed. Nonetheless, the record contains two monthly operating statements, one for June of 1999 and the other for September of 1999, which petitioner prepared for Fashion World which establish that it was in Chapter 11 bankruptcy.

account for and pay over withholding taxes during the year 1999 when the business was winding down its affairs and in Chapter 11 bankruptcy. Moreover, it cannot be concluded that any such failure to collect and pay over withholding tax on behalf of Fashion World was a “willful” failure by petitioner, an additional requirement to hold a person liable under Tax Law § 685(g) (*see, Matter of Rounick*, Tax Appeals Tribunal, October 17, 1991 [wherein the Tribunal noted that “subsequent events beyond the control of petitioner caused the withholding taxes to not be paid” and therefore a finding of willfulness could not be made against Mr. Rounick]).

I. The petitions of Andrew Genett are granted, and the two notices of determination each dated July 9, 2001 and the four notices of deficiency dated July 9, 2001 are canceled.

DATED: Troy, New York
November 24, 2004

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE